SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

RICHARD CAVALIER, ANTHONY MASSAR, CHRISTOPHER TAGUE, and SCHOHARIE COUNTY REPUBLICAN COMMITTEE,

Plaintiffs,

v.

WARREN COUNTY BOARD OF ELECTIONS, BROOME COUNTY BOARD OF ELECTIONS, SCHOHARIE COUNTY BOARD OF ELECTIONS, and NEW YORK STATE BOARD OF ELECTIONS,

Defendants.

Index No. EF2022-70359

Hon. Martin D. Auffredou

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF THE ATTORNEY GENERAL'S CROSS-MOTION TO DISMISS THE COMPLAINT

LETITIA JAMES
Attorney General
State of New York
The Capitol
Albany, New York
(518) 776-2025

JEFFREY W. LANG
Deputy Solicitor General
SARAH L. ROSENBLUTH
Assistant Solicitor General
of Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Constitutional Provisions **Page(s)**

New York State Statutes

Other State Statutes

Other State Statutes **Page(s)**

Miscellaneous Authorities

Letitia James, as the Attorney General of the State of New York, having intervened in this action as of right pursuant to Executive Law § 71 and C.P.L.R. 1012(b)(1), respectfully submits this memorandum of law in opposition to plaintiffs' motion for a preliminary injunction and in support of her cross-motion to dismiss the complaint pursuant to C.P.L.R. 3211(a)(7).

PRELIMINARY STATEMENT

Election Law § 8-400(1)(b) allows individuals who satisfy applicable age and residency qualifications to vote absentee, rather than in person, if they expect to be unable to appear in person to vote "because of illness or physical disability." In August 2020, at the height of the COVID-19 pandemic, the Legislature amended that statute to provide that, until January 1, 2022, inability to visit the polls "because of illness" shall include, but not be limited to, "instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public." L. 2020, ch. 139, § 1.

In October 2021, the Appellate Division, Fourth Department, in *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dep't 2021), affirmed that the 2020 amendment to Election Law § 8-400 is constitutional under article II, § 2 of the State Constitution, which allows the Legislature to permit individuals to vote absentee if they are unable to vote in person "because of illness or physical disability," among other reasons. In November 2021, at the general election, New York voters rejected a sweeping ballot proposal that would have amended the State Constitution to authorize all voters to vote absentee in any election for any reason. And in January 2022, the Legislature made a far more modest change to the Election Law by extending the 2020 amendment to section 8-400 through the end of the calendar year only, in light of ongoing community spread of covid-19.

Plaintiffs—two voters, one sitting Republican assemblyman, and the Schoharie County Republican Committee—seek a declaration that Election Law § 8-400 is unconstitutional insofar as it allows individuals who are not ill to vote absentee. Specifically, plaintiffs claim that the amendment is not authorized by article II, § 2 of the New York State Constitution, which is the source of the Legislature's power to allow absentee voting. In other words, plaintiffs raise the exact same challenge to the exact same statutory text that the Fourth Department rejected in *Ross*.

This Court should deny plaintiffs' motion for a preliminary injunction and grant the Attorney General's motion to dismiss the complaint. And because the Attorney General's motion presents a question of law only, the Court may treat it as one seeking a declaration and declare the statute to be a constitutional exercise of legislative authority to regulate absentee voting. That result is dictated by the binding Appellate Division precedent of *Ross*. But even if this were a matter of first impression, the same result would be required. The amendment to Election Law § 8-400 fits comfortably within the text and purpose of article II, § 2 of the State Constitution, and plaintiffs have failed to establish the statute's unconstitutionality beyond a reasonable doubt.

FACTUAL AND PROCEDURAL BACKGROUND

A. The New York State Constitution authorizes the Legislature to allow absentee voting.

The Constitution of the State of New York confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. N.Y. Const., art. II, § 1. For a time, the Constitution expressly required that qualified individuals wishing to vote had to do so in person at a polling place located in the "town or ward," *see* N.Y. Const., art. II, § 1 (1821), and later the "election district," *see* N.Y. Const., art. II, § 1 (1846), in which they resided, "and not elsewhere." That express requirement no longer exists. *See* N.Y. Const., art. II,

§ 1, amend. of Nov. 8, 1966. But the Constitution has generally been regarded as continuing to retain the requirement implicitly.

For more than 150 years, however, the Constitution has also expressly authorized the Legislature to allow certain categories of qualified individuals, for whom in-person voting would be impracticable, to vote by other means. The first such authorization, prompted by the Civil War, was added in 1864 and covered soldiers in federal military service who were absent from their election districts during wartime. N.Y. Const., art. II, § 1, amend. of Mar. 8, 1864.

Over time, the Constitution's express authorization for the Legislature to permit so-called "absentee voting" has been expanded. Notably, in 1955, the Constitution was amended to authorize the Legislature to allow absentee voting for "qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability." N.Y Const., art. II, § 2, amend. of Nov. 8, 1955. This amendment was adopted at the general election of 1955 after having been passed by the Legislature.

The amendment had been recommended to the Legislature by a committee consisting of members of the Assembly and Senate. The committee was tasked with finding ways "to afford to the people a maximum exercise of the elective franchise and a maximum expression of their choice of candidates for public office and party position." (Rosenbluth Aff. Ex. A at 3.)[1,2] The committee "approached the problems affecting the elective franchise in a manner designed to eliminate technicalities and to bring about a maximum exercise of the elective franchise by voters." (Rosenbluth Aff. Ex. A at 10.) In recommending the subject amendment, the committee stated,

[1] The Court may consider the legislative history cited herein when ruling on the Attorney General's motion under C.P.L.R. 3211(a)(7). *See, e.g.*, *Matter of Albany Law School v. New York State Off. of Mental Retardation & Dev. Disabilities*, 81 A.D.3d 145, 149 (3d Dep't 2011), *modified on other grounds*, 19 N.Y.3d 106 (2012).

[2] All exhibit page references are to the document's original pagination, not NYSCEF's pagination.

"This amendment will permit qualified voters who may be unable to appear personally at the polling place on Election Day because of illness or physical disability, to apply for an absentee ballot." (Rosenbluth Aff. Ex. A at 18.) "This amendment will afford to many persons an opportunity to exercise their right to vote who at the present time, through no fault of their own, are unable to do so." (Rosenbluth Aff. Ex. A at 18.)

The Constitution's authorization for the Legislature to allow absentee voting on account of illness or physical disability remains in place today. The constitutional absentee-voting provision presently reads as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes.

N.Y. Const., art. II, § 2.

B. The Legislature enacts Election Law § 8-400 to allow absentee voting and, in 2020, expands access to such voting in light of the covid-19 pandemic.

The Legislature has made use of the Constitution's authorization to allow absentee voting by enacting the statute now codified as Election Law § 8-400. This statute allows multiple categories of individuals meeting applicable age and residency qualifications to vote absentee. In particular, the statute allows absentee voting for any qualified voter "if, on the occurrence of any [of several specified types of] election, he or she expects to be . . . unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability." *Id.* § 8-400(1)(b).

As is now well-known, in March 2020, the World Health Organization declared covid-19 a global pandemic. The Governor and Legislature quickly implemented a number of measures

aimed at mitigating the spread of the novel virus and addressing the various consequences of its airborne transmission. One of the measures that the Legislature adopted was an amendment to Election Law § 8-400 that was designed to address the risk of contracting covid-19 when congregating with others to vote in person.

The amendment to Election Law § 8-400 elaborated on the meaning of the statutory phrase "because of illness" by providing that an inability to appear personally at the polling place "because of illness"

> shall include, but not be limited to, instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.

L. 2020, ch. 139, § 1. This proviso, which was effective August 20, 2020, was to expire on January 1, 2022. *Id.* § 2.

The Senate introducer's memorandum explained that the amendment to § 8-400 was designed to "allow New Yorkers to request an absentee ballot if they are unable to appear personally at their polling place due to an epidemic or disease outbreak." (Rosenbluth Aff. Ex. B at 1.) Naturally, the memorandum focused on the outbreak of covid-19. "Individuals, especially those who are high-risk, should be given the tools to take extra precautions to navigate the coronavirus pandemic." (Rosenbluth Aff. Ex. B at 1.) "High-risk individuals who are trying to limit their potential exposure or other's [sic] exposure to the virus should not have to decide between protecting their health or exercising their civic duty." (Rosenbluth Aff. Ex. B at 1.) "Similarly, individuals who are preventively quarantined should still be able to participate in our elections." (Rosenbluth Aff. Ex. B at 1.)

C. A group of voters challenge the constitutionality of Election Law § 8-400 as amended; Supreme Court, Niagara County dismisses the complaint and the Fourth Department affirms in October 2021.

In March 2021, a group of voters, together with the Conservative Party of the State of New York and the Niagara County Conservative Party Committee, commenced an action in Supreme Court, Niagara County, seeking a declaration that the 2020 amendment to Election Law § 8-400 violated article II, § 2 of the New York State Constitution. *Ross v. State of New York*, Index No. E174521/2021 (Niagara County Sup. Ct. Mar. 18, 2021) (NYSCEF Doc. No. 2). The plaintiffs in the *Ross* action—like the plaintiffs here—alleged that the legislative expansion of the definition of "illness" was contrary to the constitutional text. *Id.* ¶ 61.

The action was dismissed in its entirety. *See Ross v. State of New York*, Index No. E174521/2021 (Niagara County Sup. Ct. Sept. 8, 2021) (NYSCEF Doc. No. 61). In an oral decision, Supreme Court (Sedita, J.) ruled that Election Law § 8-400 was a constitutional exercise of the Legislature's authority under article II, § 2 to regulate absentee voting. *Ross v. State of New York*, Index No. E174521/2021 (Niagara County Sup. Ct. Sept. 8, 2021) (NYSCEF Doc. No. 68) (attached to Rosenbluth Affirmation as Exhibit C). The court reasoned that "[t]he plain language of Article 2, Section 2 of the New York State Constitution does not tie eligibility to cast one's vote by absentee ballot to the illness of a voter"—for example, it does not limit eligibility to vote absentee to those who are unable to do "because of *their* illness." (Rosenbluth Aff. Ex. C at 44 [emphasis added].) Instead, the constitutional text "permits a voter to cast an absentee ballot because of illness without further elaboration, qualification or limitation," and without defining the term "illness." (Rosenbluth Aff. Ex. C at 44.) And, the court reasoned, the disease caused by the covid-19 virus is plainly an illness. (Rosenbluth Aff. Ex. C at 45.) Thus, the court held that, in amending Election Law § 8-400, the Legislature merely clarified the definition of an "otherwise

undefined term." (Rosenbluth Aff. Ex. C at 46.) In so doing, the Legislature prevented voters from having to choose between their health and their right to vote. (Rosenbluth Aff. Ex. C at 46-47.).

In an October 2021 order, the Fourth Department affirmed "for reasons stated at Supreme Court." *Ross v. State of New York*, 198 A.D.3d 1384 (4th Dep't 2021).

D. Later in 2021, a ballot proposal that would have allowed all voters to vote absentee for any reason fails to pass.

A ballot proposal, known as Proposal 4, was submitted to New York voters at the November 2021 general election. (Compl. ¶ 17.) The ballot proposal would have amended article II, § 2 of the Constitution to authorize the Legislature to allow any voter to vote absentee in any election without any further eligibility requirements. The following shows the amendments that Proposal 4 would have made to article II, § 2:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters ~~who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability,~~ may vote and for the return and canvass of their votes in any election.

See New York State Bd. of Elections, *2021 Statewide Ballot Proposals*, https://www.elections.ny.gov/2021BallotProposals.html (last visited Aug. 26, 2022).

Proposal 4 failed to garner a majority of votes and was accordingly not enacted into law. (Compl. ¶ 17.)

E. In 2022, the Legislature extends the effectiveness of the 2020 amendment to Election Law § 8-400.

The Legislature enacted a further legislative amendment to the Election Law in January 2022, an amendment that was "deemed to have been in full force and effect on and after December 31, 2021." *See* L. 2022, ch. 2, § 1. That amendment (i) extended the effectiveness of the 2020

amendment to Election Law § 8-400 until December 31, 2022, and (ii) extended the provisions of the 2020 amendment to absentee voting in village elections. *Id.* Otherwise, the Legislature made no substantive changes to the eligibility requirements for absentee voting.

In debating the 2022 amendment, the Legislature was aware of the Fourth Department's decision in *Ross* holding that the 2020 amendment was a constitutional exercise of legislative authority. (Rosenbluth Aff. Ex. D at 44.) In the Legislature's view, a further exercise of that authority was necessary because "[u]nfortunately, the COVID-19 pandemic still poses significant risks to the health of New Yorkers." (Rosenbluth Aff. Ex. E at 7.) The Legislature thus extended expanded access to absentee voting through the end of 2022 "so that New Yorkers can continue to participate in our elections without compromising their health and safety." (Rosenbluth Aff. Ex. E at 2.)

F. Plaintiffs commence this action, raising an identical challenge to the one rejected by the Fourth Department, and move for a preliminary injunction.

On July 20, 2022—six months after the 2022 amendment to Election Law § 8-400 was enacted—plaintiffs filed the instant complaint, raising a challenge identical to the one rejected in the *Ross* action by both Supreme Court and the Fourth Department. Plaintiffs are two voters, one sitting Republican assemblyman who is up for reelection, and the Schoharie County Republican Committee. (Compl. ¶¶ 6-9.)

Plaintiffs' complaint—like the complaint in *Ross*—alleges that the Legislature impermissibly expanded the definition of "illness" contained in Election Law § 8-400(1)(b) in a manner contrary to the text of article II, § 2 of the New York Constitution. (Compl. ¶ 29.) Plaintiffs further allege that absentee ballots issued pursuant to that definition are "illegal," "will dilute the value of the legal ballots" cast by the voter-plaintiffs, and "will infect the results of the election" of the candidate-plaintiff. (Compl. ¶¶ 30-31.)

As relief, plaintiffs seek (i) a declaration that the definition of "illness" contained in Election Law § 8-400(1)(b) is contrary to the Constitution, (ii) a declaration that absentee ballots issued by defendants pursuant to this definition would "illegally cancel or dilute the legal votes of Plaintiffs," (iii) an injunction against the distribution of absentee ballots to "voters who are not 'ill' but instead fear 'a risk of contracting or spreading a disease that may cause illness,'" and (iv) an order requiring the State Board of Elections to "remove all language based on N.Y. Election Law § 8-400(1)(b)'s definition of 'illness' from its website and other materials and guidance." (Compl. Prayer for Relief ¶¶ 1-4.)

On August 18, 2022—over four weeks after the commencement of the action—plaintiffs moved by order to show cause for a preliminary injunction precluding defendants Warren County Board of Elections and New York State Board of Elections from "distributing or accepting absentee ballots from voters who are unable to appear at their polling place due to the risk of contracting or spreading a disease that may cause illness to the voter or to other member [sic] of the public." (Order to Show Cause at 1-2.) For reasons that are unexplained, plaintiffs do not seek preliminary relief against Broome County Board of Elections or Schoharie County Board of Elections, who are also defendants in this action.

ARGUMENT

POINT I

PLAINTIFFS' REQUESTED RELIEF IS IMPRACTICABLE AND BARRED BY THE DOCTRINE OF LACHES

Plaintiffs' motion for a preliminary injunction requests relief that appears to be impracticable, if not impossible, to accomplish. Plaintiffs seek to preclude certain defendants from "distributing or accepting absentee ballots from voters who are unable to appear at their polling place due to the risk of contracting or spreading a disease that may cause illness to the voter or to

other member [sic] of the public." (Order to Show Cause at 1-2.) However, there appears to be no way of readily identifying the specific voters who have requested an absentee ballot for that reason. The absentee-ballot request form on the State Board of Elections' website asks the applicant whether she is requesting an absentee ballot due to "temporary illness or physical disability," "permanent illness or physical disability," "duties related to primary care of one or more individuals who are ill or physically disabled," or another non-illness-related reason. *See* New York State Absentee Ballot Application, *available at* https://www.elections.ny.gov/NYSBOE/download/voting/AbsenteeBallot-English.pdf (attached to Rosenbluth Affirmation as Exhibit F). The form does not ask the applicant to specify whether, in providing an illness-related reason, he seeks to vote absentee "due to the risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public," as provided in Election Law § 8-400(1)(b). Voters may also request absentee ballots through an online portal,[3] which instructs users to check the box for "Temporary Illness" if they are "affected by COVID-19," but similarly does not differentiate between covid-related temporary illness and non-covid-related temporary illness.[4] (*See* Rosenbluth Aff. Ex. G [screenshot of application on online portal]).

Thus, there appears to be no way to grant plaintiffs' requested relief without also precluding defendants from sending absentee ballots to voters who have indisputably valid illness- or disability-related reasons for seeking to vote absentee. While plaintiffs have not explained how they expect defendants to comply with any injunctive relief granted, compliance would presumably require defendants to refrain from sending absentee ballots to any applicant who has

[3] *See* https://absenteeballot.elections.ny.gov/.

[4] The website of the Warren County Board of Election directs applicants to this online portal. *See* Warren County, *Absentee Voters*, https://www.warrencountyny.gov/boe/absentee (last visited Aug. 26, 2022).

cited "temporary illness or physical disability" as the reason for her request—including, for example, voters with broken legs and other temporary mobility-impairing disabilities. This would impermissibly disenfranchise innumerable voters.

Moreover, even if it would have been theoretically possible for defendants to redesign the absentee-ballot application process in order to effectuate plaintiffs' requested relief without disenfranchising indisputably legitimate absentee voters, it is too late to do so now, less than a month from the issuance of absentee ballots. Accordingly, the doctrine of laches bars plaintiffs from demanding those changes at this late date. "Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Matter of League of Women Voters of N.Y. State v. New York State Bd. of Elections*, 206 A.D.3d 1227, 1229 (3d Dep't), *lv. denied*, 38 N.Y.3d 909, *rearg. denied,* 38 N.Y.3d 1120 (2022) (internal quotation marks omitted).

While plaintiffs assert that "time is of the essence" because absentee ballots will be issued on September 23, 2022 (NYSCEF Doc. No. 13), the time crunch is of plaintiffs' own creation. Plaintiffs waited for nearly six months after the Governor signed the 2022 amendment to Election Law § 8-400 on January 21 before commencing this action. Even once commenced, on July 20, plaintiffs waited another four weeks before moving for a preliminary injunction on August 18—just five weeks before absentee ballots are to be mailed. As the Third Department recently observed in another election case, "[s]uch delay was entirely avoidable and undertaken without any reasonable explanation." *Matter of League of Women Voters*, 206 A.D.3d at 1230 (dismissing, based on laches, petition/complaint challenging constitutionality of redrawn map of assembly districts, which was commenced five weeks before primary); *see also Matter of Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't), *lv. dismissed*, 38 N.Y.3d 1053 (2022) (same). "[E]lection matters

are exceedingly time sensitive and protracted delays of this nature impose impossible burdens upon respondent [the State Board of Elections], who is obligated to comply with the strict timelines set forth in the Election Law." *Matter of League of Women Voters*, 206 A.D.3d at 1230. Having failed to act promptly in bringing this claim, plaintiffs are not entitled to force last-minute changes to election procedures.

POINT II

BINDING PRECEDENT ESTABLISHES THAT THE AMENDMENT TO ELECTION LAW § 8-400 IS CONSTITUTIONAL

Because plaintiffs' request for injunctive relief is impracticable and/or barred by the doctrine of laches, the Court need not reach the merits of plaintiffs' claim. In any event, the Fourth Department's decision in *Ross*, 198 A.D.3d at 1384, is binding precedent that is dispositive of this case on the merits. In that case, the court rejected an identical challenge to the identical statutory language at issue here, affirming Supreme Court's judgment that the definition of the phrase "because of illness" found in Election Law § 8-400, as amended, does not violate the State Constitution.

This Court is "bound by the doctrine of stare decisis to apply precedent established in another Department," in the absence of any available precedent from the Third Department or the Court of Appeals. *Shoback v. Broome Obstetrics & Gynecology, P.C.*, 184 A.D.3d 1000, 1001 (3d Dep't 2020) (internal quotation marks omitted); *see also Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664-65 (2d Dep't 1984). And there is no available precedent from the Third Department or the Court of Appeals here. The Fourth Department's decision in *Ross* is the only appellate decision to date that has addressed the constitutionality of the 2020 amendment to Election Law § 8-400. Under *Ross*, the amendment is a constitutional exercise of legislative authority.

The binding nature of *Ross* is not altered by the fact that the decision was, in plaintiffs' terms, a "two-paragraph summary disposition." (Mem. at 14.) In support of the proposition that the rule of stare decisis discussed above "does not apply to summary dispositions," plaintiffs cite a lone decision of Supreme Court, Orange County, *GHVHS Med. Group, P.C. v. Cornell*, 69 Misc. 3d 611 (Sup. Ct. 2020). (Mem. at 14.) In that case, the court declined to follow available First Department precedent on the ground that the relevant issue was decided "summarily." *GHVHS*, 69 Misc. 3d at 615-16. Plaintiffs, however, neglect to mention that both the Second and Third Departments have held that the very case that the court declined to follow in *GHVHS—Matter of Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465 (1st Dep't 2019)—is indeed entitled to precedential status and thus binding on trial courts. *See Maple Med., LLP v. Scott*, 191 A.D.3d 81, 91 (2d Dep't 2020), *aff'd sub nom. Columbia Mem. Hosp. v. Hinds*, -- N.Y.3d ---, 2022 N.Y. Slip Op. 03306 (2022); *Shoback*, 184 A.D.3d at 1001.[5] Thus, according to both the Second Department (in which the trial court in *GHVHS* sat) and the Third Department (in which this Court sits), the court in *GHVHS* erred. And plaintiffs are incorrect in any event that the Fourth Department's decision in *Ross* contains no detailed reasoning. (*See* Mem. at 14.) The court permissibly referred to the trial court's rationale and adopted it as its own.

Additionally, there has been no material change in the law since *Ross* was decided that would undermine the decision's applicability to this case. Contrary to plaintiffs' suggestion (Compl. ¶¶ 17-18; Mem. at 1), the failure of Proposal 4 at the 2021 general election does not constitute a change in the law, nor does it otherwise have any bearing on the proper interpretation of the constitutional text at issue, which has remained unchanged since the Fourth Department's

[5] The Court of Appeals subsequently abrogated the First Department's *Schaffer* decision in *Columbia Mem. Hosp. v. Hinds*, -- N.Y.3d ---, 2022 N.Y. Slip Op. 03306 (2022). However, when the court in *GHVHS* issued its decision, *Schaffer* was still good law and the First Department was still the only appellate court in the State that had weighed in on the relevant issue.

decision. Proposal 4 would have amended article II, § 2 of the State Constitution so as to remove all limitations on the Legislature's authority to permit absentee voting; without any constitutional limitations, the Legislature would have been free to allow all voters to apply for absentee ballots for any reason for all future elections. As the sponsor of the 2022 legislation recognized, however, the amendment to Election Law § 8-400 is "much narrower than that." (Rosenbluth Aff. Ex. D at 40.) Whereas the ballot proposal would have paved the way for universal "no excuse" absentee voting—allowing voters to vote absentee for any and all reasons—the amendment retains the "excuse" requirement, allowing individuals to vote absentee only if they are unable to vote in person due to the risk of catching or spreading an illness. And where the ballot proposal would have allowed for "no excuse" absentee voting in perpetuity, the amendment (which expires on December 31, 2022) allows only for expanded absentee voting through the end of this year.

Thus, even assuming that any inference can be drawn from the voters' inaction on Proposal 4—a proposition even more "dubious" than drawing inferences from "[l]egislative inaction," *see Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 184 (2016) (internal quotation marks omitted)—the only reasonable inference is that the voting public rejected sweeping reform to absentee-voting laws in favor of the status quo. That status quo permits the Legislature to make narrower adjustments to eligibility requirements for absentee voting, as the Fourth Department recognized in *Ross*. At bottom, however, voters' preferences, as expressed in the vote on Proposal 4, cannot and did not alter the text or meaning of the constitutional and statutory provisions at issue here.

Consequently, *Ross*—which addressed statutory text identical to that currently in force—remains good law, binds this Court, and establishes the constitutionality of Election Law § 8-400, as amended. Plaintiffs are therefore not entitled to any relief.

POINT III

THE AMENDMENT TO ELECTION LAW § 8-400 IS CONSTITUTIONAL AS A MATTER OF FIRST IMPRESSION

Even if the Fourth Department's decision in *Ross* did not control, denial of plaintiffs' requested relief would still be warranted. An analysis of the plain text of article II, § 2 of the State Constitution, as well as broader principles of constitutional interpretation, demonstrate that the amendment to Election Law § 8-400 fits comfortably within the Legislature's constitutional authority.

Preliminarily, because "the only issues presented are questions of law," the Attorney General's motion to dismiss "should be treated as one seeking a declaration" in favor of the statute's constitutionality. *Dodson v. Town Bd. of the Town of Rotterdam*, 182 A.D.3d 109, 112 (3d Dep't 2020) (quoting Siegel & Connors, New York Practice § 440 at 848 [6th ed. 2018]). The Court may thus "review the merits of the issues presented and declare the rights of the parties." *Id.* at 113; *see generally Matter of Kerri W.S. v. Zucker*, 202 A.D.3d 143, 153-55 (4th Dep't 2021), *lv. dismissed*, 38 N.Y.3d 1028 (2022) (describing courts' powers and duties in ruling on C.P.L.R. 3211(a)(7) motions in declaratory judgment actions). Accordingly, in an addition to an order denying plaintiff's motion for a preliminary injunction, the Attorney General seeks a declaration that Election Law § 8-400, as amended, is constitutional under article II, § 2.

A. Election Law § 8-400 is constitutional under the plain text of article II, § 2 of the State Constitution.

Article II, § 2 of the State Constitution reads in full as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, *may be unable to appear personally at the polling place because of illness or physical disability*, may vote and for the return and canvass of their votes.

N.Y. Const., art. II, § 2 (emphasis added).

This text—which is the "starting point" in any constitutional analysis, *Harkenrider v. Hochul*, -- N.Y.3d ---, 2022 N.Y. Slip Op. 02833, at *5 (Apr. 27, 2022)—contains at least four indications that the Legislature is permitted to broaden access to absentee voting during a pandemic by allowing individuals to vote absentee because they risk spreading or contracting an illness if they vote in person—even if they are not, to their knowledge, personally ill.

First, the word "illness" can refer not only to the condition of being ill but also to a particular type of disease. For example, Merriam-Webster defines "illness" as both "an unhealthy condition of body or mind" and "a specific disease."[6] Merriam-Webster, *Illness*, https://www.merriam-webster.com/dictionary/illness (last visited Aug. 26, 2022) (referring to definition of "sickness"); Merriam-Webster, *Sickness*, https://www.merriam-webster.com/dictionary/sickness (last visited Aug. 26, 2022). Plaintiffs do not appear to dispute that covid-19 is an example of a specific disease. So, when the Constitution permits the Legislature to allow individuals to vote absentee "because of illness," it effectively permits absentee voting "because of covid-19."

Second, the absence of the word "their" before "illness" in article II, § 2 confirms that "illness" can refer to a communicable disease that is present in a community, such as covid-19, not just a voter's own condition of being ill. The absence of that word is notable given its presence elsewhere in the same section, which uses possessive pronouns conveying an association with the qualified voter himself. For example, the Constitution authorizes the Legislature to allow absentee voting for qualified voters who may be "absent from the county of *their* residence" on election day. N.Y. Const., art. II, § 2 (emphasis added). In so doing, the Legislature may arrange for "the

[6] Plaintiffs cite Merriam-Webster's definition of "illness" (Mem. at 13) but inexplicably fail to mention the meaning given of "a specific disease," even though that is the first meaning listed.

return and canvass of *their* votes." *Id.* (emphasis added). The use of "their" unmistakably limits the "residence" and the "votes" to those of the qualified voter.

Similar limiting language appears in the absentee-voting provision as it existed when the "because of illness" provision was first added in 1955. While subsequent constitutional amendments have produced the text of article II, § 2 as it exists today, the 1955 version of that section is particularly probative because it represents the entirety of the provision that the drafters of the "because of illness" amendment intended to codify. After the 1955 amendment, article II, § 2 stated as follows:

> The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be unavoidably absent from the place of *their* residence because *they are* inmates of a soldiers' and sailors' home or of a United States veterans' bureau hospital, or because *their* duties, occupation or business, or *those of* members of *their* families, require them to be elsewhere, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of *their* votes.

(Rosenbluth Aff. Ex. H at 2105 [emphases added].)

This provision uses words such as possessive pronouns to convey associations with particular people. For example, the absence of qualified voters "because of *their* duties, occupation or business, or *those of* members of *their* families" plainly requires absence occasioned by the duties, occupation, or business of the qualified voters and their relatives. The 1955 version also uses present-tense verbs to communicate currently existing conditions. Specifically, the clause permitting individuals to vote absentee if "*they are* inmates of a soldiers' and sailors' home or of a United States veterans' bureau hospital" clearly requires *present* confinement.

However, no similar language is used to reference the requisite "illness." That word appears unadorned. This contrast reinforces the inference that a voter may be unavailable "because

of illness" if the illness is either one from which he suffers, or a communicable disease prevalent in the community that could be transmitted at the polling place.

Plaintiffs' argument to the contrary focuses on the text's pairing of the word "illness" with "physical disability," which, plaintiffs suggest, indicates that both words refer to a voter's personal traits. (Mem. at 7.) That is a possible reading of the text. However, as demonstrated above, the interpretation of "illness" that encompasses a communicable disease prevalent in the community is a "broader and at least equally tenable interpretation." *Matter of Siwek v. Mahoney*, 39 N.Y.2d 159, 165-66 (1976). Accordingly, under standard principles of constitutional interpretation, it is the one that should be adopted. (*See* Point III.B, *infra*.) Plaintiffs also cite other unrelated statutes outside of the Election Law that contain the word "illness" in an attempt to show that it refers only to an individual's personal condition. (Mem. at 8-9.) But the term "illness" appears in those statutes in entirely different contexts, without any of the other textual indicators present in article II, § 2. And the cases that plaintiffs cite (Mem. at 9) that have interpreted those statutes do not rule out the possibility that the term "illness" could extend to a communicable disease prevalent in the community, as the term in article II, § 2 does.

The Connecticut Supreme Court recently came to the same conclusion in the course of interpreting similar language in the Connecticut Constitution, which allows the legislature of that State to authorize absentee voting where individuals are unable to vote in person "because of sickness, or physical disability or because the tenets of their religion forbid secular activity." Conn. Const., art. VI, § 7. The court reasoned that "[t]he presence of [the word 'their'] tying religious observance to the voter personally, in the absence of similar words so limiting 'sickness,' strongly suggests that the term 'sickness' is capacious enough to include an identified illness such as

COVID-19 that has created a public health emergency." *Fay v. Merrill*, 256 A.3d 622, 645 (Conn. 2021).

Notably, the 2020 amendment to Election Law § 8-400 in response to the covid-19 pandemic was not the first time that the New York Legislature acted on the more capacious understanding of the term "illness"—that it is not limited to voters personally. In 2009, for example, the Legislature amended the statute so as to extend absentee voting to individuals who are unable to vote in person because of "duties related to the primary care of one or more individuals who are ill or physically disabled." L. 2009, ch. 426, § 1. Plaintiffs concede that that amendment was constitutional (Mem. at 12-13), a concession that fatally undermines their position that the term "illness" refers exclusively to a condition that is "personal" to the voter (Mem. at 7). Indeed, the constitutionality of the caregiver provision has never been questioned. Rather, it has been accepted for over a decade that constitutional authorization for absentee voting "because of illness" does not require illness personally and presently afflicting the qualified voter. This unchallenged legislative view of article II, § 2 has been "acquiesced in by all departments of the state government," making it a "a practical construction of the constitutional provision now in question" that "ought not now to be disturbed." *People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 376 (1896).

Third, the words "because of" in article II, § 2 suggest that the Legislature may authorize absentee voting where the existence of a communicable disease in the community is the but-for cause of a voter's inability to vote in person. As the United States Supreme Court has explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1739 (2020) (internal quotation marks omitted). "That form of causation is established whenever a particular outcome would not have happened 'but for' the

purported cause." *Id.* "In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* So, when voting conditions are the same as usual except that a voter is now unable to appear in person to vote "because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public," Election Law § 8-400(1)(b), the existence of the illness or disease is the but-for cause of the individual's inability to vote in person—she is unable to vote in person "because of illness." Put differently, if the illness of covid-19 were not circulating in the community, certain voters would vote in person instead of requesting absentee ballots. While plaintiffs argue that a "'risk' that something 'may cause illness'" is not equivalent to an "illness" (Mem. at 7 [quoting Election Law § 8-400(1)(b)]), in either case the illness itself is the but-for cause of the voter's inability to vote in person.

Fourth, when the Constitution provides that absentee voting is allowable where a voter "*may be unable* to appear personally at the polling place because of illness," N.Y. Const., art. II, § 2 (emphasis added), the text recognizes that arrangements may be made for absentee voting based on a future contingent event. The Third Department's decision in *Matter of Sherwood v. Albany County Bd. of Elections*, 265 A.D.2d 667 (3d Dep't), *lv. denied*, 94 N.Y.2d 754 (1999), is instructive. In that case, the court addressed a challenge to certain absentee ballots that were cast by voters who applied for the ballots with a good-faith belief that they would be away from the county on Election Day (as required under Election Law § 8-400[3][c]), but who ultimately proved to be present at the relevant time. *Id.* at 668. The court rejected the argument that the Constitution requires "actual absence" by the voter on Election Day in order to vote absentee, noting that article II, § 2 authorizes absentee voting by those who "*may* be absent from the county of their residence" and thus contemplates that some may not prove to be absent on Election Day. *Id.* (emphasis in

original). The court accordingly held that it was constitutional to permit the canvassing of ballots voted by individuals who were not actually absent on Election Day.

Under *Sherwood*'s logic, then, it is constitutional under article II, § 2 for the Legislature to authorize an individual to vote absentee if, when the individual applies for the ballot, she expects in good faith to be unable to vote in person because of illness, even if she is not actually ill on Election Day.

Plaintiffs' remaining counterarguments lack merit. While plaintiffs argue that a "fear [of] getting COVID-19" does not constitute a good-faith belief that one will be unable to vote in person (Compl. ¶ 24; *see, e.g.*, Mem. at 6-7), that does not establish that the 2020 amendment to Election Law § 8-400 is contrary to article II, § 2. An individual's lack of such a good-faith belief would, at most, be grounds for contesting the canvassing of the individual's ballot under the procedures set forth in Election Law § 8-506. However, the possibility that one or more individuals may apply for an absentee ballot without the requisite good-faith belief does not mean that the 2020 amendment is inconsistent with the text of the Constitution. In any event, in light of the continued community spread of covid-19,[7] it is eminently reasonable for a voter to fear that she may come down with covid-19 at some point close in time to the November election or that she could contract covid-19 from a fellow voter at a polling place—either of which could make her "unable to appear personally at the polling place because of illness" within the meaning of article II, § 2.

Courts also have rejected the argument that this reference to being "unable" to vote in person should be interpreted as requiring a voter to be utterly incapable of appearing in person, as plaintiffs apparently advocate. (*See* Mem. at 6-7.) The constitutional text does not define the term "unable" or otherwise require that the Legislature limit absentee voting to those who have, for

[7] *See generally* New York State Dept. of Health, *Positive Tests Over Time, by Region and County*, https://coronavirus.health.ny.gov/positive-tests-over-time-region-and-county (last visited Aug. 26, 2022).

example, been deemed medically unable to leave the house by a physician. *See Parker v. Brooks*, No. CV 92 0338661S, 1992 WL 310622, at *3 (Conn. Super. Ct. Oct. 20, 1992) (cited with approval in *Fay*, 256 A.3d at 646). Without any such limitation, the Legislature may permissibly defer to the voter's own judgment as to whether he or she will be unable to appear in person. *See Fay*, 256 A.3d at 646 (noting that "a voter's ability to appear is uniquely subjective"). That construction is supported by the 2010 amendment to the Election Law cited by plaintiffs (Mem. at 12), which eliminated the requirement that a prospective absentee voter include with his application a statement of the "particulars of his illness or disability" and that the board of elections investigate the truth of such statement. L. 2010, ch. 63, § 1. The removal of that requirement only confirms the Legislature's intent to leave the assessment of one's inability to vote in person up to the individual voter—an intent that is consistent with the broad constitutional text.

Finally, the out-of-State cases cited by plaintiffs are not persuasive. Unlike here—where plaintiffs seek to invalidate an act of the Legislature that expanded absentee voting to respond to the pandemic—the plaintiffs in each of the cases cited were voters who sought to establish a right to absentee voting that was broader than the plain text of the relevant statute allowed. And those statutes were far narrower than either article II, § 2 of the New York Constitution or Election Law § 8-400. For example, in those other States, absentee voting for illness-related reasons is permitted only if:

- Mississippi: the voter "*is under a physician-imposed quarantine* due to COVID-19 during the year 2020 or is caring for a dependent who is under a physician-imposed quarantine due to COVID-19 during the year 2020." Miss. Code Ann. § 23-15-713(d) (emphasis added).
- Missouri: the voter expects to be prevented from voting in person due to "*confinement* due to illness or physical disability." Mo. Ann. Stat. § 115.277.1(2) (emphasis added).
- Tennessee: "*[t]he person is* hospitalized, ill or physically disabled, and because of such condition, the person is unable to appear at the person's polling place on election day." Tenn. Code Ann. § 2-6-201(5)(C) (emphasis added).

- Texas: "*the voter has* a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." Tex. Elec. Code Ann. § 82.002(a)(1) (emphasis added).
- Wisconsin: the voter "*is indefinitely confined* because of age, physical illness or infirmity." Wis. Stat. Ann. § 6.86(2)(a) (emphasis added).

The courts in those States thus declined to "second-guess the wisdom or policy of [the] legislative enactment," as the Missouri Supreme Court put it, by expanding absentee voting beyond the narrow scope of the statutory text. *Missouri State Conference of Natl. Assn. for the Advancement of Colored People v. Missouri*, 607 S.W.3d 728, 733 (Mo. 2020). Here, by contrast, it is plaintiffs who ask the Court to second-guess the Legislature's judgment. In allowing any voter to vote absentee because of "a risk of contracting or spreading a disease," Election Law § 8-400(1)(b), the New York Legislature has made a different policy choice than have the legislatures of those other States. The counterpoints provided by other States' statutes only underscore the breadth of the "because of illness" enabling language in New York's Constitution.

B. Principles of constitutional interpretation confirm that Election Law § 8-400 is constitutional.

If there were any doubt as to the constitutionality of Election Law § 8-400 under the plain text of article II, § 2 (and there should be none), principles of constitutional interpretation would require that any doubts be resolved in favor of the law's constitutionality. Two considerations support this conclusion.

First, plaintiffs' burden in establishing the facial unconstitutionality of Election Law § 8-400, like any statute, is a heavy one. "Legislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Sullivan v. New York State Joint Commn. on Pub.*

Ethics, -- A.D.3d ---, 2022 N.Y. Slip Op. 03553, at *5 (3d Dep't June 2, 2022) (quoting *White v. Cuomo*, -- N.Y. 3d ---, 2022 N.Y. Slip Op. 01954, at *4 [Mar. 22, 2022]). That means that "all doubts should be resolved in favor of the constitutionality of an act." *White*, 2022 N.Y. Slip Op. 01954, at *10 (internal quotation marks omitted). As demonstrated in Point III.A above, the statutory and constitutional text can readily be reconciled with one another; to the extent that any doubts remain, they should be resolved in favor of the statute's constitutionality. Plaintiffs have not met their burden of establishing the statute's invalidity "beyond a reasonable doubt." *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 149 (2017).

Second, in determining a statute's constitutionality, courts broadly interpret constitutional provisions regarding individual rights in order to effectuate their purpose. The Court of Appeals has recognized that the individual right at issue here, the right to vote, "is one of the most important and cherished constitutional rights," *Leaks v. Board of Elections of City of N.Y.*, 58 N.Y.2d 882, 883 (1983), and that the "whole purpose" of constitutional provisions regarding suffrage is that voters shall have "equal, easy, and unrestricted opportunities to declare their choice for each office," *Matter of Crane v. Voorhis*, 257 N.Y. 298, 301 (1931) (internal quotation marks omitted). And the specific purpose of the 1955 constitutional amendment that authorized absentee voting because of illness was to "afford to the people a maximum exercise of the elective franchise and a maximum expression of their choice of candidates for public office." (Rosenbluth Aff. Ex. A at 3.) Quite contrary to plaintiffs' argument that the amendment to Election Law § 8-400 renders the constitutional text "meaningless" (Mem. at 8), it in fact was a legislative effort to safeguard the electorate's "maximum exercise of the elective franchise" in light of a global pandemic of unprecedented proportions, consistent with the intent of article II, § 2's framers.

Given this constitutional purpose of maximally encouraging electoral participation, courts have affirmed the constitutionality of similar statutes designed to expand access to the franchise. For example, in *Matter of Siwek*, 39 N.Y.2d at 159, the Court of Appeals upheld a statute that permitted voter-registration applications to be filed by mail. The Court rejected the argument that the phrase "personal application" in article II, § 6 precluded mail applications, opting instead for a "broader and at least equally tenable interpretation" that effectuated the constitutional purpose of facilitating "convenience" in voter registration. *Id.* at 165-66. For a similar reason, the Third Department in *Sherwood*, 265 A.D.2d at 669, discussed in Point III.A above, rejected the argument that the Constitution requires absentee voters to actually be absent from the jurisdiction on Election Day, instead endorsing an interpretation that did not disenfranchise voters.

The decision of the Court of Appeals in *Matter of Gross v. Albany County Bd. of Elections*, 3 N.Y.3d 251 (2004), on which plaintiffs rely (Mem. at 7), is not to the contrary. The Court in *Gross* considered whether to excuse the local board of elections' noncompliance with the provision of the Election Law requiring absentee ballots to be sent only to voters who have submitted an updated application for that election cycle. *Gross*, 3 N.Y. 3d at 254. The Court did not purport to interpret the constitutional text that is at issue here. While the Court did opine, as plaintiffs note, that the absentee-voting statutory scheme was intended to mitigate against "fraud" and "coercion," *id.* at 255, it made that observation in service of its conclusion that "strict compliance" with the Election Law was required: "when elective processes are at issue, the role of the legislative branch must be recognized as paramount," and "there is no invitation for the courts" to interfere with legislative objectives, *id.* at 258 (internal quotation marks omitted). Here, however, the legislative branch has clearly spoken in favor of expanding access to absentee voting during the pandemic—within the parameters of its constitutional authority to allow absentee voting "because of illness."

Finally, plaintiffs' parade of horribles is not actually so horrible. Plaintiffs posit that, if Election Law § 8-400 is upheld, the Legislature would in the future be able to "declare the flu especially dangerous to elderly voters, and allow any voter over age 50 unlimited access to an absentee ballot." (Mem. at 8.) That may well be true: particularly in years when unusually virulent strains of the flu are going around, such an enactment would be a sensible public-health policy that would also satisfy the "because of illness" constitutional requirement. However, plaintiffs are incorrect to the extent they believe that, under the Attorney General's interpretation, any voter could request an absentee ballot simply to avoid catching a cold, without more. Of course, there are certain immunocompromised voters for whom the common cold presents a particular health risk—but those voters likely would already be able to request an absentee ballot on account of their own condition of being ill. Other voters would be unlikely to have a good-faith belief that the circulation of less severe or contagious viruses made themselves "unable" to vote in person. In any event, plaintiffs' unfounded hypotheticals do not present a reason to invalidate the law.

* * *

For all the reasons discussed, the 2020 amendment to Election Law § 8-400 is constitutional. As the Court of Appeals has instructed, "[i]t is for the legislature" to "decide when the law should give way to the circumstances of the moment." *Matter of Seawright v. Board of Elections in City of N.Y.*, 35 N.Y.3d 227, 235 (2020) (internal quotation marks and citation omitted). The Legislature did just that when it temporarily amended the absentee-voting provision of the Election Law in 2020 and renewed the amendment through the end of 2022, to ensure that the circumstances of the pandemic did not needlessly disenfranchise any voter. The Constitution permits such legislative action.

POINT IV

PLAINTIFFS HAVE NOT ESTABLISHED ANY IRREPARABLE HARM AND THE BALANCE OF THE EQUITIES WEIGHS AGAINST THEM

Plaintiffs have not established any irreparable harm as is necessary to secure preliminary relief in their favor. They have not advanced any theory of irreparable harm that is distinct from their view of the merits. (*See* Mem. at 16-18.) As explained above, however, they are wrong on the merits; thus, their theory of irreparable harm necessarily fails, too. And the balance of the equities tips not in their favor but rather in support of effectuating legislative intent and avoiding the needless disenfranchisement of countless voters.

CONCLUSION

The Court should deny plaintiffs' motion for a preliminary injunction and issue a declaration that Election Law § 8-400, as amended, is consistent with article II, § 2 of the State Constitution.

Dated: Albany, New York
August 29, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: _____
SARAH L. ROSENBLUTH
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2025
sarah.rosenbluth@ag.ny.gov

JEFFREY W. LANG
Deputy Solicitor General
SARAH L. ROSENBLUTH
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

I, Sarah L. Rosenbluth, hereby certify that, according to the word-count feature of the word-processing program used to prepare this memorandum, this memorandum of law contains 8,871 words and thus complies with the length limits set forth in pursuant to 22 N.Y.C.R.R. § 202.8-b(e), as enlarged by the Court per its email of August 23, 2022.

SARAH L. ROSENBLUTH